kyser

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Sent: Wednesday, June 22, 2011 4:29 PM
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Marty,

In a more serious vein, I have reread Kyser. Note that page 1 of the opinion says the Supreme Court is considering whether the "no very serious consequences rule" of Silva was superseded by the exclusionary zoning provision of the Township Zoning Act. (TZA)

When I wrote earlier today that had Moyle played by the book he would have likely been grandfathered in because Kyser was a 2010 decision, that was a true statement assuming no lawyer was sharp enough to realize that the Supreme Court would answer the above question in the affirmative. That is to say, the holding in Kyser is not simply that Silva is deemed unconstitutional, but that ," further, we conclude that the rule (in Silva) is superseded by the exclusionary zoning provisions of the zoning enabling act" (page 2, Kyser)
So, it will come as news to your legislative people , I would think, that to introduce the rule of Silva is to introduce something that has been declared to " violate the constitutional separation of powers" (Silva, page 2)

Thus, in the rush to pass this bill there seems to be a glaring error, irrespective of the error in judgment and the seeming lack of wisdom in denying townships the right to control their own land-use destinies.

At page 24 of Kyser it is stated in footnote 18 that Silva was decided in the same month that the Legislature included the exclusionary zoning provision in the T ZA .
Thus, the Supreme Court noted that the Silva decision was decided independent of that amendment. The Court also went on to point out that MCL 125. 3207 under the ZEA precludes Township from totally prohibiting the establishment of a land-use in the presence of a demonstrated need for that land-use . The ZEA is the successor legislation to the TZA but uses essentially the same language regarding the prohibition against excluding a use such as a gravel extraction.

And the court, in deference to the legislature, states that it is clear that in Michigan the legislature , "intended that localities would be responsible for regulating the extraction of natural resources within their boundaries." Kyser, 27. That comment was meant to clearly say the courts should not routinely be involved because it violates the separation of powers between the local legislative authority and the judiciary.
With the Supreme Court having ruled that the no very serious consequences rule is unconstitutional and unworkable because it requires the judiciary to decide cases one at a time, on a case-by-case basis, it is clear to me that what the Senate proposes is unconstitutional. Page 28, Kyser.
The Supreme Court cannot and will not allow local courts to serve as super zoning officials becoming tied up every time a citizen and a mining or gravel operation has an argument over the ambiguous question of just what do the words " no serious consequences" mean?

So there you have my take. I believe what is proposed is wrongheaded and unconstitutional. That is because, the Supreme Court has said so. We cannot return to a day when the courts sit in judgment of the legislative prerogative, the local legislative prerogative, to determine land-use. What has become confused here is the authors of the proposed legislation somehow believed that Kyser was the court making law rather than the legislature. The opposite is true, Kyser said Silva was court made law and thus it was unconstitutional. And even though someone might argue if we impose Silva legislatively how can it be court made law , I would say it would not then be court made law, but it would still be unconstitutional because it intrudes on the local legislative function by making circuit courts the arbiter of all local zoning issues which employ or involve the no serious consequences standard.

Thanks for listening,

Steve pence,

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